

In the March 22, 2005, Award, Judge Moore awarded claimant an 18 percent whole person functional impairment, finding claimant sustained permanent impairment to her neck and left shoulder. The Judge found that claimant's alleged left arm and low back complaints were not related to claimant's February 25, 2003, accident. Additionally, the

Judge determined claimant was a part-time employee for purposes of computing her pre-injury average weekly wage, which the Judge found was \$179.66.

In further addressing the extent of claimant's disability, Judge Moore determined claimant failed to prove she was permanently and totally disabled. Moreover, the Judge denied an award for work disability<sup>1</sup> benefits after finding claimant retained the ability to earn wages equal to or in excess of her earnings at the time of her accident. Therefore, as indicated above, claimant's award of permanent disability benefits was limited to her 18 percent whole person functional impairment rating.

Claimant contends Judge Moore erred. First, claimant argues her pre-injury average weekly wage should be calculated using information from the 26-week period preceding her accident and not limited to the approximate three and one-half weeks claimant worked part-time for respondent before her accident. Accordingly, claimant contends her pre-injury average weekly wage is \$302.44 or \$326.98 and that she was underpaid temporary total disability benefits. Second, claimant argues she sustained significant impairment to her neck, left shoulder, left arm and low back due to the February 25, 2003, accident. Claimant contends she suffered a 100 percent wage loss, a 100 percent task loss and a permanent total disability. Accordingly, claimant requests the Board to modify the March 22, 2005, Award and grant her benefits for a permanent total disability.

Respondent contends the Award should be affirmed. Respondent argues Judge Moore correctly calculated claimant's pre-injury average weekly wage and correctly determined the nature and extent of claimant's injuries and disability.

The issues before the Board on this appeal are:

1. What is claimant's pre-injury average weekly wage?
2. What is the nature and extent of injury and disability?
3. Is claimant entitled to receive future medical treatment for her low back?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed.

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<sup>1</sup> A permanent partial general disability greater than the functional impairment rating.

### Average weekly wage

At the time of her February 25, 2003, accident, claimant was working for respondent as a part-time hourly employee. Before early February 2003, however, claimant worked full-time for respondent. Accordingly, the issue presented to the Judge was whether claimant's average weekly wage for purposes of determining her workers compensation benefits should be based upon the wages she earned as a part-time employee or whether her average weekly wage should include the wages she earned as a full-time employee.

The Workers Compensation Act addresses how to compute an average gross weekly wage in K.S.A. 2002 Supp. 44-511, which provides, in part:

(a)(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

. . . .

(b)(4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; . . .

(b)(5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks **so employed**, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. . . . **The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average**

**weekly overtime computed as provided in paragraph (4) of this subsection.**  
(Emphasis added.)

On the date of accident, claimant's "specific employment" was being a part-time driver. Accordingly, the Judge did not err in determining claimant's average gross weekly wage based upon her part-time earnings. The Board, therefore, adopts the Judge's finding that claimant's average weekly wage for purposes of determining her workers compensation benefits was \$179.66 per week.

### **Nature and extent of injury and disability**

The Board affirms the Judge's finding that claimant injured her neck and left shoulder in the February 2003 accident. Claimant alleges the February 2003 fall aggravated her low back, which had previously been fused. But when claimant completed a pain drawing for Dr. Lee R. Dorey in July 2003, she did not indicate she was having any low back symptoms. Dr. Dorey, who treated claimant for several months, did not attribute claimant's low back complaints to the February 2003 accident. Likewise, Dr. Paul S. Stein, who examined claimant in May 2004 at respondent's request, did not relate claimant's low back complaints to her work-related accident. Dr. Stein found no evidence that claimant's low back condition had been aggravated or accelerated by her fall.

The Board is aware that claimant's medical expert witness, Dr. Pedro A. Murati, concluded claimant aggravated her low back in the February 2003 fall. Nonetheless, the Board finds the greater weight of the evidence establishes that claimant's low back complaints are not related to her work injury. Instead, it is more probably true than not that claimant's low back problems are due to the natural progression of her earlier injuries and lumbar surgeries. Accordingly, claimant is not entitled to workers compensation benefits for her low back condition or complaints.

Likewise, the Board affirms the Judge's finding that claimant sustained an 18 percent whole person functional impairment due to her February 2003 accident. The Board finds Dr. Stein's opinions of claimant's functional impairment rating, which was provided by using the AMA *Guides*<sup>2</sup> (4th ed.), are persuasive.

Claimant contends she is permanently and totally disabled as she is allegedly required to lie down during the day to alleviate her low back complaints. But the Board disagrees. Moreover, the Board is not persuaded that claimant has made an honest effort to find a part-time position that she could perform considering all of her alleged problems,

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

including her low back. Although claimant has contacted a number of potential employers, she has submitted job applications at only three of them.

The question of whether a worker has made a good faith effort to find appropriate employment is not necessarily determined by the number of contacts a worker has made with potential employers. Nor is it determined by the number of interviews or job applications that have been completed. Instead, the question is decided on a case-by-case basis considering all the facts and circumstances.

In summary, the Board agrees with the Judge's conclusion that claimant has failed to make a good faith effort to find suitable alternative employment and, therefore, a post-injury wage should be imputed for purposes of the permanent partial general disability formula set forth in K.S.A. 44-510e. Accordingly, the Board affirms the Judge's finding that claimant's permanent partial general disability is limited to her 18 percent whole person functional impairment rating.

#### **Future medical treatment**

The Award did not grant claimant future medical benefits for her low back. Instead, the Award provided that any request for future medical treatment would be considered upon proper application. As the evidence fails to establish that claimant either injured or aggravated her low back as a result of the February 2003 accident, claimant's request for ongoing or future medical treatment for her low back is denied. Conversely, the Board affirms the Judge's conclusion that requests for additional medical treatment will otherwise be considered upon proper application.<sup>3</sup>

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

The parties are reminded that only those medical records that are material to an issue need be introduced into the record.

#### **AWARD**

**WHEREFORE**, the Board affirms the March 22, 2005, Award entered by Judge Moore.

**IT IS SO ORDERED.**

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<sup>3</sup> See K.S.A. 2004 Supp. 44-510k.

Dated this \_\_\_\_ day of September, 2005.

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BOARD MEMBER

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BOARD MEMBER

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c:     Andrew L. Oswald, Attorney for Claimant  
       Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier  
       Bruce E. Moore, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director